

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

NOTICE OF MOTION NO.1135 OF 2003
IN
SUIT NO.816 OF 2003

Jayesh R.Shah ..Plaintiffs

Vs.

Ketan Rikhabdas Shah and Anr. ..Defendants

WITH

NOTICE OF MOTION NO.1140 OF 2003
IN
SUIT NO.1057 OF 2003

Nehal S.Shah ..Plaintiffs

Vs.

Ketan Rikhabdas Shah and Anr. ..Defendants

Ms.Kalpana Vaskar i/b Anil Mishra for the
plaintiffs

Mr.Simil Purohit a/w V.B.Kanoria for the defendant
no.2

CORAM : S.U.KAMDAR, J
DATED : 3RD OCTOBER, 2005

P.C.:

1. The present suit is filed by flat purchaser in respect of an agreement dt.5.6.98 originally entered into between defendant no.1 for purchase of the flat. It is the case of defendant no.1 that in

respect of the said flat, defendant no.1 sold the said premises to various flat owners and ultimately he did not hand over possession of the flat in respect of the said building constructed. However, he assured that plaintiffs will be accommodated and entered into another agreement dt.21.1.00 for the purpose of sale of flat to plaintiffs herein. Plaintiffs have also paid full price in respect of said flat. The learned counsel for defendant no.2 contends that though there was a proposal that the building be constructed in partnership with defendant no.1, the said partnership never fructified and they have themselves constructed the building on the said plot under Slum Rehabilitation Scheme. He has further filed an affidavit dt.3.10.05 inter alia contending that there are no flats available to be given to the flat purchaser on the said property now developed by the 2nd defendant in his own rights.

2. The learned counsel for defendant no.2 has further contended that plaintiffs have not made payment of any amount to defendant no.2. He further states that he cannot be made liable for

payments made by the plaintiffs to the defendant no.1. It has been further contended that the said project in respect of which present suit is filed only belongs to defendant no.2 and defendant no.1 has no right title and interest therein and therefore no interim orders can be passed in favour of the plaintiffs. It has been further contended that defendant no.2 has in this project only constructed rehabilitation building and that they have not constructed residential building as a part of sale component but hotel is constructed which is mortgaged to third party.

3. I am of the opinion that there is a clear fraud which has been committed by defendant no.2 inconnivance of defendant no.1. Defendant no.1 entered into original agreement for sale of flat and received full amount. The averments made in respect of full payment has not been controverted by defendant no.1 by filing any affidavit. Defendant no.1 has thereafter entered into the second agreement to which also there is no denial. Defendant no.2 have admittedly come on the scene through the proposal of partnership with defendant

no.1 in respect of the said plot of land. However, now defendant no.2 contends that the said partnership did not fructify. In my opinion on the aforesaid fact it is clear that defendant no.2 was well aware of the various rights which are created in respect of property by the defendant no.1. It is not possible to accept the contention that though they were contemplating a partnership with the defendant no.1 in respect of the suit flat they did not care to ascertain the rights already created by the defendant no.1 in respect of the said plot which was originally to be developed by the defendant no.1 and 2 jointly but now developed by defendant no.2 individually. In spite of the aforesaid, defendant no.2 has taken project for construction and now is seeking to defeat the right of plaintiffs in these notice of motions.

4. In my opinion, it is not permissible to defendant no.2 to dispose of the property and make the suit infructuous. In view of the fact that a plaintiff is a flat purchaser and have made full payment of the suit flat I am of the opinion that the rights of the plaintiffs must be protected. I

therefore, appoint Court Receiver in respect of entire suit property being plot of land bearing CTS NO.539/C1(part) of Village Chakala, Sahar Road, Andheri East, Mumbai. Court Receiver is directed not to dispossess any person. However, Court Receiver will make list of persons who are found in occupation and possession and appoint them as agent without royalty and/or compensation. Court Receiver is also directed to make report whether (1) there is any possibility to construct the building on the said plot of land so as to accommodate the plaintiffs and / or (2) whether there is any accommodation available in respect of said property to protect the rights of the flat by earmarking a particular flat. Court Receiver to make such report within 2 weeks from today. On receipt of such report from the Court Receiver the court will consider to pass appropriate further reliefs in the matter. Motions are disposed of accordingly. Order is stayed for a period of 2 weeks on the application of defendant no.2.